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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	)	ET Docket 92-9

TO: The Commission

COMMENTS OF AMERICAN PERSONAL COMMUNICATIONS ON PETITIONS FOR RECONSIDERATION

AMERICAN PERSONAL COMMUNICATIONS

Mr. J. Barclay Jones
Vice President for Engineering

AMERICAN PERSONAL COMMUNICATIONS
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Jonathan D. Blake
Lee J. Tiedrich

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Its Attorneys

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SUMMARY

The Commission has established fair and equitable policies for providing access to the 2 GHz band for emerging technologies and protecting the interests of incumbent 2 GHz licensees. Notwithstanding the Commission's even treatment of all of the competing interests, several petitioners request that the Commission tip this delicate balance in favor of their own self-interests at the expense of other affected parties and the public interest.

First, Apple requests that the Commission expand the use of retuning of incumbent microwave users in order to clear spectrum for its own nomadic data service. This proposal, however, disregards the fact that retuning will further encumber the licensed PCS band. It also trivializes the disruption and delay associated with retuning and ignores the potential impact on licensed PCS services and PCS service to the American public. Additionally, Apple requests that the Commission adopt a "reasonableness standard" which would force public safety incumbents and licensed PCS providers to consent to retuning based upon a showing which could not be objective, easy to administer, or consistent with other important policy objectives. Because the Commission's policies provide ample spectrum and opportunity for unlicensed nomadic data services, and because Apple's proposals would undermine other important policies, these portions of Apple's petition should be denied.

Second, various microwave groups request that the Commission broaden the definition of public safety in order to increase the number of incumbents exempt from involuntary relocation. These groups, however, disregard that the Commission's present policy exempts all services where the majority of communications is used for operations involving the safety of life and property. These groups also overlook the fact that a broader exemption could stymie efforts to clear spectrum for emerging technologies and that the current relocation policies protect the interests of all incumbents.

Third, two incumbent microwave organizations request that the Commission delay the initiation of the voluntary negotiation period until the identity of the licensee is known. These concerns, however, are misplaced because PCS applicants will have incentive to ascertain the cost of relocation prior to the auction. The proposed competitive bidding procedures also should deter frivolous applications. In addition, negotiating prior to the auctions would be purely voluntary and could enhance the incumbents' bargaining positions. Accordingly, the Commission should permit voluntary negotiations once PCS applications are accepted by the Commission.

Finally, two incumbent groups requests that the Commission grant tax certificates to licensees who relocate after the voluntary negotiation period. This policy, however, would undermine the incentives to relocate in a timely manner

and could delay the deployment of PCS services. Accordingly, the Commission should limit the use of tax certificates to the voluntary negotiation period.

At bottom, the Commission has fairly and equitably considered all of the competing interests in this proceeding. Each of the above-referenced proposals would protect one particular interest at the expense of the others. Therefore, these portions of the petitions for reconsideration should be denied.

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American Personal Communications[1/] ("APC"), hereby opposes several petitions for reconsideration and/or clarification of the Third Report and Order, ET Docket No. 92-9, FCC 93-351, released August 13, 1993, in the above-captioned proceeding. First, APC opposes the petition filed by Apple Computer, Inc. ("Apple") to the extent that it attempts to expand the use of "retuning"[2/] of incumbent microwave licensees into licensed PCS spectrum. Second, APC opposes the attempts of the various microwave groups to expand dramatically the number of microwave licensees that will be exempt from involuntary relocation under the Commission's

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[1/] American PCS, L.P., d/b/a American Personal Communications, a limited partnership in which American Personal Communications, Inc. is the general managing partner and The Washington Post Company is an investor/limited partner.

[2/] "Retuning" is a harmless sounding concept that means bailing the water out of unlicensed PCS's canoe into licensed PCS's canoe.

transition plan.[3/] Third, APC opposes the petitions filed by the Utilities Telecommunications Council ("UTC") and the Association of American Railroads ("AAR") seeking to delay the commencement of the voluntary negotiation period and extend the use of tax certificates to the involuntary negotiation period.

I. THE COMMISSION PROPERLY DECIDED TO PERMIT RETUNING ONLY FOR PUBLIC SAFETY MICROWAVE INCUMBENTS AND ONLY ON A VOLUNTARY BASIS.

The Commission has established an equitable scheme for providing access to the 2 GHz frequency band for emerging technology providers and preventing disruption to incumbent 2 GHz licensees. See generally Third Report and Order at ¶¶ 1-3. Despite the Commission's careful treatment of all the competing interests, Apple claims that this scheme is "unintentionally skewed against the interests of companies who must deploy so-called 'nomadic' technologies." Apple Petition at 1. Apple seeks to redress this perceived imbalance by requesting, in part, that the Commission encourage or at least permit in-band retuning of incumbent microwave users and adopt

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[3/] The various microwave groups include The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), The Public Safety Microwave Committee ("PSMC"), The Forestry-Conservation Communications Association ("FCCA"), The Public Safety Communications Council ("PSCC") and The American Association of State Highway and Transportation Officials ("AASHTO").

a reasonableness standard for retuning incumbent public safety licensees. Id. at 3-10.

APC is sympathetic to the difficulties of relocating incumbent microwave users and, like Apple, recognizes the importance of clearing the spectrum for nomadic PCS devices.[4/] However, APC has learned from real-world experience, that retuning will compound, not relieve, the cost and time associated with deploying PCS services as a whole. Additionally, the adoption of a reasonableness standard for retuning incumbent public safety licensees is impractical, unworkable and could hinder the development of many PCS services. These additional costs and delays to the provision of many PCS services simply cannot be justified, especially since the Commission already has given nomadic PCS devices special consideration in this proceeding. For these reasons, the Commission should deny these portions of Apple's petition for reconsideration.

A. Retuning Is Not Cost Effective For Incumbent Microwave Users or PCS Service Providers.

Apple's claim that retuning will make 2 GHz spectrum available for nomadic PCS devices in a timely, cost-effective manner is based on the incorrect factual assumptions that: 1)

[4/] For this reason, APC was the first to propose allocating the prime 1910-1930 MHz spectrum to unlicensed PCS. APC Supplement to Petition for Rulemaking at 21-22 filed May 4, 1992.

incumbent licensees will not have to relocate twice; 2) the cost of retuning is significant; and 3) retuning will not burden licensed PCS providers. See Apple Petition at 4, 6-8. When the factual record is set straight, it is evident that retuning would compound, not relieve, the cost of deploying PCS services, thereby harming consumers in the not-so-long run by encumbering their use of valuable spectrum for licensed PCS services.[5/]

1. Retuning Would Require Incumbents To Move Twice.

Apple's proposal would require incumbent microwave licensees to relocate twice because retuning will further encumber the licensed PCS frequency bands. Any retuning of microwave paths from the 1890-1930 MHz unlicensed PCS band would result in relocating the incumbents into the 1850-1890

[5/] Apple has taken strong positions on the use of unlicensed spectrum in the past only to later decide that its own proposals made the spectrum unusable. Apple's Comments in Docket 89-354, which authorized spread spectrum systems in Part 15 frequencies, indicated that ". . . the Commission has carefully addressed the concerns of both the industry and consumers and has crafted a solution that clearly will facilitate the innovative and more efficient use of the spectrum. . . ." See Apple Comments at 7, Gen. Docket No. 89-354, filed October 12, 1989. In its Reply Comments, Apple argued ". . . strongly in favor of injecting maximum flexibility into the rules" and that the record provided ". . . a particularly sound basis upon which to adopt the proposed regulations." Apple Reply Comments at 2, 10, Gen. Docket No. 89-354, filed November 6, 1989. Yet three years later Apple repudiated this position. See e.g., Apple Comments at 3, Gen. Docket No. 90-314, filed November 10, 1992.

MHz and 1930-1990 MHz bands. All but the 1970-1990 MHz portion of these bands were allocated for licensed PCS services.[6/] Since the vast majority of incumbents utilize two-way microwave links, even a retuning of one end of a microwave link out of the unlicensed band and into the 1970-1990 MHz band, would require the other end of the link to be retuned into the licensed PCS frequencies. See generally Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Docket No. 90-314, FCC 93-451, released October 22, 1993 ("Second Report").

Apple plainly agrees that retuning makes sense only when 2 GHz frequencies are available. Apple Petition at 9 n.21. Indeed, Apple's petition, filed prior to the Commission's Second Report and Order, proposed retuning only when it "represents the best available option, upon consideration of the many mechanical, logistical, and financial concerns involved in frequency-reengineering a path." Id. at 8. Further, Apple contemplates that "retuning within the 2 GHz band . . . would be facilitated in some cases if the Commission sets aside reserve bands in the midst of the

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6/ The 1970-1990 MHz band was held in reserve for mobile satellite services (MSS) in accordance with WARC-92 designations. Second Report at ¶ 63. But sharing between MSS and terrestrial microwave facilities is generally not believed to be practical.

band as Apple has proposed elsewhere."[7/] Id. Now that the Commission has decided not to set aside retuning bands, Apple should agree that the decision to allow retuning only for non-public safety incumbent microwave licensees is not appropriate.

2. **Retuning Is Time Consuming and Expensive.**

To support its retuning proposal, Apple also trivializes the disruption and delay associated with retuning incumbent microwave users. Apple Petition at 7-8. Indeed, Apple downplays these factors by stating that "[r]etuning . . . may involve a set of hardware changes, some of them requiring factory parts or processes and others within the scope of field practice." Apple Emergency Petition at 8. Apple further trivializes the impact of double relocations by commenting . . ." [t]he degree of service disruption under the various alternatives will be another of the many factors that will be considered." Id.

Even assuming that there were 2 GHz frequencies available, retuning is a timely, complicated and expensive process. APC's real-world experience with retuning 1850-1990 MHz microwave equipment verifies information APC has received

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[7/] As set forth in APC's Comments on Apple's Emergency Petition filed concurrently in Gen. Docket No. 90-314, the Commission did not reserve two or more 10 MHz spectrum blocks in the 1850-1990 MHz band for five years in order to retune incumbent microwave licensees.

from microwave operators and equipment manufacturers -- the majority of the links in the 1850-1990 MHz band use old, analog equipment that cannot simply be retuned. As part of its experimental activities, APC tested interference criteria between its operational PCS system and an operational 1850-1990 MHz point-to-point microwave link. Baltimore, Gas & Electric, the heaviest user of the 1850-1990 MHz band in the Washington-Baltimore area, donated a microwave link for this testing. The link required retuning in order to be deployed in the downtown Washington area. Because the link used analog equipment, typical of equipment in this band, APC had to ship the equipment back to the manufacturer and wait 8 weeks for the retuning to be completed. Retuning thus sounds easy on paper, but in the real world it is a messy, complicated, time-consuming process.

3. **Retuning Will Burden Licensed PCS Providers.**

Similarly, Apple incorrectly denies that retuning will enable unlicensed PCS providers to "'dump' facilities into others' spectrum" because "the entity that performed the retuning would remain responsible for the costs of any subsequently-required out-of-band move." Apple Petition at 7-8. But even if the unlicensed PCS provider pays for the subsequent relocation of a retuned incumbent, the licensed PCS provider still will face greater delays and uncertainty.

Under the best circumstances, a retuned incumbent may immediately agree to relocate from the licensed PCS band. Nevertheless, licensed PCS service might not commence until the 18 to 24 month relocation process is completed. In most situations, the second relocation will require more than 18 to 24 months because PCS licensees simply cannot force retuned incumbents out of their spectrum blocks. Instead, PCS licensees would have to commence a two-year voluntary negotiation period, which would then be followed by a one-year mandatory negotiation period. Third Report and Order at ¶¶ 13-16. Only at the end of the mandatory negotiation period, could the incumbent licensee be requested to relocate involuntary from the licensed PCS band. Id. It is unclear whether or how Apple proposes to compensate PCS licensees for the time, energy and uncertainties associated with this second relocation process.

B. **The "Reasonableness" Standard is Unworkable.**

After full consideration of Apple's proposal, the Commission properly concluded that retuning would be allowed only for public-safety licensees with the written consent of all affected parties. Third Report and Order at ¶ 29. Nevertheless, Apple now proposes that the Commission adopt a "reasonableness" standard for granting retuning consent. According to this standard, public safety licensees could not "unreasonably" refuse to retune their existing facilities if

an adequate showing is made that retuning would not "adversely affect" its operations. Apple Petition at 10. Additionally, PCS licensees would not be able to "unreasonably" withhold consent for placing retuned incumbent public safety licensees in their spectrum blocks. Id.

Apple, however, is silent as to how a reasonableness showing could be made. Retuning proponents presumably would have to analyze the demand for current technologies, products and services. Additionally, proponents would have to predict the development and deployment of revolutionary emerging technologies, products and services in order to prove that encumbering licensed PCS spectrum with retuned microwave paths will not adversely affect PCS licensees. Furthermore, Apple is silent as to the threshold that will be used for reasonably withholding consent and how disputes concerning these matters will be settled.[8/] APC continues to be sympathetic toward Apple's proposal to be able to move public safety licensees, but whatever mechanism the Commission develops to address

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[8/] Finally, the uncertainties associated with adopting a reasonableness standard for retuning will reduce auction revenues by attracting lower auction bids. Any PCS licensee who has bid competitively for the right to use the spectrum will want the right to decide whether to encumber the auctioned spectrum further with retuned microwave paths. If this right is denied, the value of the spectrum will decrease. Additionally, the purpose of setting aside frequencies for emerging technologies is to encourage the development of new technologies and services. Apple has not addressed how the proposed reasonableness standard could be consistent with this goal.

these concerns should not be at the expense of licensed PCS service.

C. The Commission Already Has Given Nomadic Data Devices Special Consideration In This Proceeding.

Notwithstanding Apple's claim that this proceeding is "skewed" against nomadic devices, the Commission has gone to special and unique lengths to expedite the provision of unlicensed PCS services, including unlicensed data devices. Indeed, the Commission has reserved the least encumbered spectrum for these devices, exempted this service from auctions, and established a shorter negotiation period for relocating incumbent licensees.[9/]

Apple's unsubstantiated concern that non-nomadic devices with early deployment will occupy all of the unlicensed frequencies is at least partially resolved by the separate frequency blocks allocated for voice and data

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[9/] Apple states that without further assurances it "will not invest the significant amounts necessary to develop and manufacture Data-PCS products." Apple Petition at 11 (emphasis added). This statement flatly contradicts Apple's earlier statement that the Commission's framework for unlicensed PCS "stymies a computer industry that has wireless product ready to market and is awaiting only the frequencies." Id. at 3. If funds for the development and manufacture of unlicensed products have not yet been committed, then the computer industry must not have a wireless product ready to market and a one year negotiation period should not be overly burdensome.

services. It is theoretically possible, although unproved by Apple, that "fixed" data devices will be so commercially successful that all the available data frequencies will be occupied before Apple's data devices can be introduced. APC submits, however, that the marketplace, not the FCC, should be the ultimate arbiter of this issue. However, if the Commission deems this a legitimate problem, the solution should not hinder the development of licensed PCS.

II. THE COMMISSION SHOULD NOT CHANGE THE DEFINITION OF PUBLIC SAFETY TO INCREASE THE NUMBER OF INCUMBENT LICENSEES EXEMPT FROM INVOLUNTARY RELOCATION.

The Commission appropriately limited its exemption from involuntary relocation to police, fire and emergency medical services where the "majority of communications" on these facilities are used for "operations involving safety of life and property." Third Report and Order at ¶ 52. As an additional safeguard, the Commission will exempt other Part 94 licensees (licensed on a primary basis under the eligibility criteria of Part 90 Subparts B and C) from involuntary relocation upon a showing that "the majority of the communications carried on those facilities are used for operations involving safety of life and property." Id. In essence, the Commission has adopted the same standard for exempting all of these licensees from involuntary relocation. The only difference is that police, fire and emergency medical

services are presumed to be exempt whereas other licensees are not.

Notwithstanding that this policy protects all entities with substantial public safety duties, various microwave groups[10/] now ask the Commission to broaden the involuntary relocation exemption to include at least all Part 90 Public Safety Radio Services. These groups, however, refuse to acknowledge that not all Part 90 Public Safety Radio Services or licensees of the Special Emergency Radio Service -- including state and local government facilities -- share the same responsibilities for preserving the safety of life and property. It is thus sensible to limit the exemption to the class of licensees stated in the rules adopted by the Commission.

At least one microwave group also claims that the "majority of communications" standard is arbitrary and administratively burdensome. See PSMC Petition at 6-9. In addition to being inaccurate, this statement overlooks the fact that the standard strikes a fair balance between ensuring that spectrum is available for emerging technologies and exempting vital services from involuntary relocation. Public safety microwave paths comprise a large percentage of incumbents in major markets. A blanket expansion of the exemption to include all "state and local government"

[10/]These groups are identified in footnote 3.

licensees or all entities "eligible" to be licensed in the "Public Safety Radio Services or the Special Emergency Radio Service" -- whether or not such entities actually are licensed in those services -- would unjustifiably expand the number of facilities that would never be subject to involuntary relocation to more than 2,000 facilities. This would render more than 23 percent of all incumbents operating in the 1.85-1.99 GHz band nationwide ineligible for involuntary relocation.[11/]

In contrast, the "majority of communications" standard will ensure that any vital "Public Safety Radio Service" or "Special Emergency Radio Service" is exempt from involuntary relocation. Although this standard may require some scrutiny of the facts, it is a far better solution than a blanket exclusion of over 23 percent of incumbents from involuntary relocation or providing them with no opportunity for exemption.

Finally, involuntary relocation is not punitive or unfair. State and local government licensees that do not meet the "majority of communications standard" will not, of course, be harmed by being subject to the same procedures that will govern facilities licensed to utilities and petroleum

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11/ Marrangoni, Campbell, Serafini & McGowan, Creating New Technology Bands for Emerging Telecommunications Technology, p. 8 (Office of Engineering and Technology, OET/TS 92-1, January 1992).

companies. State and local government licensees, like private licensees, never will be required to relocate unless requested to do so by a new technologies licensee, with all costs of relocation met by the new licensee and with no relocation at all permitted unless they can operate reliably at higher frequencies. These procedures protect state and local government licensees fully and completely, just as they protect private licensees that utilize the 2 GHz band for analogous purposes.[12/] Accordingly, the Commission should retain the language in its rule exempting from involuntary relocation only licensees who provide a majority of communications for operations involving safety of life and property, including the existing presumptions.

III. THE VOLUNTARY NEGOTIATION PERIOD SHOULD BEGIN WITH THE ACCEPTANCE OF APPLICATIONS FOR EMERGING TECHNOLOGY SERVICES.

The Commission properly decided to initiate the two-year voluntary negotiation period upon the "acceptance of applications for emerging technology services." Third Report and Order at ¶ 15. This will enable PCS bidders promptly to begin the process of clearing spectrum for PCS services

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[12/] Since the safeguards the Commission has built into the involuntary relocation program are so complete, one wonders whether the primary motivation for those who wish to broaden the exemptions is not to reap a profit in a voluntary negotiation process which will inevitably take place in the case of indefinitely grandfathered public safety licensees.

without causing disruption to incumbent 2 GHz users. Although the transition framework carefully balances both of these concerns, UTC requests that the voluntary negotiation period not begin until a tentative licensee is selected.[13/] UTC Petition at 5. AAR similarly seeks to delay voluntary negotiations until a license is actually granted. AAR Petition at 4-5. Both UTC and AAR claim that the negotiations will be more meaningful and serious once the identity of the PCS licensee is known.

UTC's and AAR's concerns are misplaced because PCS applicants have incentive to negotiate meaningfully and seriously with incumbent microwave users. The value of a given spectrum block will reflect, in part, the cost of relocating incumbent microwave users. Consequently, prospective bidders will have incentive to ascertain this cost prior to the auction. If an applicant can negotiate a relocation agreement prior to the auction, it will gain

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[13/] UTC also wants the Commission to clarify that the acceptance of applications for emerging technology licenses will commence the two-year voluntary negotiation period only for those frequency bands and markets where new service applications are being accepted. UTC Petition at 3-5, 8. According to this proposal, the two-year voluntary negotiation period for the 60 MHz of spectrum not allocated for PCS would commence only when the Commission accepts applications for this spectrum. Id. at 4. APC does not oppose this proposal, provided that the language adopted would start the voluntary negotiation period for any incumbent or microwave licensee involved in the interference analysis of the PCS licensee. APC is concerned that the language proposed by UTC is too vague.

valuable information to formulate its bid. The opportunity to acquire this information in a timely manner will encourage not deter voluntary negotiations prior to the award of the license.

Additionally, the proposed competitive bidding procedures will practically ensure that only qualified and serious parties apply for PCS licenses. Specifically, these procedures require bidders to submit a short-form application, a long-form application and a filing fee at the same time. Implementation of Section 309(j) of the Communications Act Competitive Bidding, at ¶ 97, PP Docket No. 93-254, FCC 93-455, released October 12, 1993. In addition, bidders have to tender a substantial upfront payment prior to the auction. Id. at ¶ 102. As a result, all PCS applicants should be serious and able to provide PCS service and ready and willing to negotiate relocation agreements with incumbent microwave licensees.

Finally, UTC incorrectly suggests that the existing policy would cause incumbents to engage in futile negotiations with a large number of unsuccessful applicants. UTC Petition at 5. However, UTC seems to forget that these negotiations are voluntary, and incumbents would not be obligated to negotiate at all.[14/] Moreover, incumbents may have a better

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[14/] The Third Report and Order expressly states that parties are encouraged but not required to negotiate and reach a

(continued...)

bargaining position if they can simultaneously negotiate with different bidders. Indeed, an incumbent could use one relocation offer as a bargaining tool with another bidder. Therefore, commencing the voluntary negotiations at the time the Commission accepts PCS applications may benefit, but will not burden, incumbent licensees. Accordingly, the Commission should retain the existing language and commence voluntary negotiations at the time it accepts applications for emerging technologies services.

IV. THE COMMISSION SHOULD GRANT TAX CERTIFICATES ONLY TO INCUMBENTS WHO RELOCATE DURING THE VOLUNTARY NEGOTIATION PERIOD.

The Commission appropriately limited the use of tax certificates to the voluntary negotiation period.[15/] Tax certificates will further the Commission's policy of encouraging voluntary relocation agreements, which, in most cases, represent the "least disruptive means" of providing spectrum for emerging technologies. Third Report and Order at ¶ 13, 42. Tax certificates, in essence, serve as a catalyst for providing free and modern 6 GHz systems to incumbents and

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[14/](...continued)
relocation agreement during the voluntary negotiation period. Id. at ¶ 15.

[15/]APC does not oppose the use of tax certificates during the one-year negotiation period for unlicensed PCS spectrum.

enabling PCS service providers to deliver innovative new services to the American public.

Although tax certificates are intended to serve as an important catalyst to the negotiation process, UTC and AAR request that tax certificates be granted beyond the voluntary negotiation period. UTC Petition at 6; AAR Petition at 6-7. This proposal, however, disregards the fact that the Commission's transition framework already fully compensates incumbents for the cost of relocation. Tax certificates are not part of this compensation, but instead reward incumbents for promptly reaching relocation agreements that eliminate the expense and delays of protracted negotiations. If tax certificates are granted beyond the voluntary negotiation period, there will be no added incentive to reach agreements in a timely, unprotracted manner and expedite the deployment of PCS service.[16/] Accordingly, the Commission should grant tax certificates only during the voluntary negotiation period.

[16/]By awarding tax certificates only during the voluntary negotiation period, the Commission has not assumed that the failure to reach an agreement during this period is the fault of the incumbent.

CONCLUSION

The petitions for reconsideration and/or clarification do not establish any basis for expanding the use of retuning for incumbent microwave licensees or expanding the definition of public safety licensees. Nor is there a compelling case for delaying the initiation of the voluntary negotiation period or granting tax certificates to incumbents who relocate after the voluntary negotiation period has ended. For these reasons, APC respectfully submits that these portions of the petitions for reconsideration and/or clarification be denied.

Respectfully submitted,

AMERICAN PERSONAL COMMUNICATIONS

By: _____
Jonathan D. Blake
Lee J. Tiedrich

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Its Attorneys

Mr. J. Barclay Jones
Vice President for
Engineering

AMERICAN PERSONAL
COMMUNICATIONS
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

November 8, 1993

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that I am an attorney with the law offices of Covington & Burling, and that on this 8th day of November, 1993, I caused to be mailed by first class United States mail, postage prepaid, a copy of the foregoing "Comments of American Personal Communications on Petitions for Reconsideration" to the following:

*Renee Licht
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

*Dr. Thomas P. Stanley, Chief
Office of Engineering and Technology
Federal Communications Commission
2025 M Street, N.W. - Room 7002
Washington, D.C. 20554

*Dr. Robert Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W. - Room 822
Washington, D.C. 20554

APPLE COMPUTER, INC.
C/O Henry Goldberg
Mary J. Dent
GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

PUBLIC SAFETY MICROWAVE COMMITTEE
C/O John D. Lane
Robert M. Gurss
WILKES, ARTIS, HEDRICK & LANE,
Chartered
1666 K Street, N.W.
Washington, D.C. 20006